IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REGIONAL EMPLOYERS' ASSURANCE LEAGUES VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION TRUST, et al.	:	CIVIL ACTION
v.	:	
SIDNEY CHARLES MARKETS, INC., et al.	:	NO. 01-4693

MEMORANDUM AND ORDER

HUTTON, J. January 29, 2003

In this case, Plaintiffs Regional Employer's Assurance Leagues ("REAL"), Delaware Valley League of Merchants North ("League"), and PennMont Benefit Services ("PennMont"), are suing Defendants, Sidney Charles Markets, Inc., Michael and Dorothy Zimmerman, and Craig Waitt, in Pennsylvania state court seeking declaratory relief and monetary damages pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. In response, Defendants filed counterclaims against Plaintiffs and a separate Counter-Defendant, Penn Public Trust. The gravamen of these counterclaims is that Plaintiffs failed to administer a Voluntary Employee Benefit Association Health and Welfare plan according to plan documents and relevant ERISA provisions. On November 14, 2001, the case was removed to this Court from the Court of Common Pleas of Montgomery County, Pennsylvania.

Defendants' Petition for Admission Pro Hac Vice of Joel N. Kreizman, Esq. (Docket No. 19) and Plaintiffs' Motion to Dismiss Defendants' Counterclaims (Docket No. 13) are presently before the Court. In the attached Order, Defendants' Motion for appointment of Joel N. Kreizman, Esq. is granted. For the reasons discussed below, Plaintiffs' Motion to Dismiss Defendants' Counterclaims is also granted.

I. BACKGROUND

Defendant Sidney Charles Markets ("SCM"), a New Jersey Corporation, owns and operates a supermarket located in the state of New Jersey. On or about December 31, 1993, SCM joined the Delaware Valley League of Merchants North and, for the benefit of its employees, adopted the League's Voluntary Employees' Beneficiary Association Health and Welfare Plan ("VEBA" or "plan"). This plan is a welfare benefits plan governed by ERISA, under which SCM was to make regular payments in exchange for life, health, and other benefits coverage for its employees. The plan agreement named Counter-Defendant Penn Public Trust as trustee of the plan. Plaintiff REAL is the trust organization that established the VEBA plan at issue in this case. The plan was administered by Plaintiff PennMont.

SCM and PennMont had numerous disputes regarding plan administration during the course of their relationship. SCM accused PennMont of failing to properly administer the plan in

several ways, including not purchasing life insurance policies for SCM employees who were to be covered by the plan. PennMont responded to these allegations by claiming that, because SCM had not filed certain plan documents in a timely fashion, it was not covered by the VEBA plan at all.

The dispute culminated with the death of SCM's bookkeeper, Jean Waitt, in early 1998. At some point shortly after her death, SCM discovered that Ms. Waitt had embezzled a large sum of money from the company. In July of that year, Michael Zimmerman, the president of SCM, informed PennMont of Ms. Waitt's death and her illegal activities. Zimmerman requested payment of Ms. Waitt's death benefits under the plan. PennMont responded, in a letter dated July 21, 1998, by informing SCM that Ms. Waitt's death benefits would "probably be denied" because her actions implicated the "bad boy" provision of the plan, which disqualifies dishonest employees from receiving plan benefits. The letter also denied the benefits request on the alternative ground that Ms. Waitt never executed a Participation Agreement and, therefore, was never a member of the VEBA plan at all.

Following this dispute, the parties exchanged a series of letters regarding whether SCM desired to remain a part of the VEBA plan. Finally, in February 1999, PennMont terminated SCM as a plan participant. At approximately the same time, SCM demanded payment of the cash values of its employees' policies under the plan.

PennMont, pursuant to § 10.11 of the VEBA plan, refused to return this money until SCM and each of its employees signed release forms. SCM and its employees refused to sign such forms.

On May 3, 2000, Defendants in this action filed suit in the United States District Court for the District of New Jersey. The case was assigned to the Honorable William G. Bassler. In that case, Defendants SCM and Zimmerman sought the return of SCM's contributions to the VEBA plan, an accounting, and a constructive trust preventing the use of any plan funds for the payment of legal fees. Defendant Waitt also sought payment of his late wife's death benefits. On March 28, 2002, Judge Bassler, in an unpublished opinion, held: (1) SCM lacked standing to assert its claim on behalf of its employees; (2) none of the plaintiffs with standing exhausted their administrative remedies, as required under the plan; and (3) ERISA completely preempts all other claims for benefits and enforcement of rights under the plan. Accordingly, Judge Bassler dismissed the complaint with leave to renew once the plaintiffs, who are Defendants in this action, exhausted their administrative remedies. On July 30, 2002, Judge Bassler issued a letter opinion denying a motion to reconsider his earlier ruling.

In this case, Plaintiffs, who were defendants in the New Jersey action, assert 12 counts in their Complaint. In Counts I-X, Plaintiffs seek declaratory relief essentially stating that they have not breached the VEBA plan as to Defendants. In Counts XI and

XII, Plaintiffs seek monetary damages from Defendant SCM on theories of breach of contract and breach of fiduciary duty, respectively.

For their part, Defendants assert five counterclaims against Plaintiffs, alleging that Plaintiffs failed to administer the VEBA plan according to plan documents and relevant ERISA provisions. An inspection of the filings reveals that these counterclaims are identical to the claims Defendants raised in their Complaint as Plaintiffs in the New Jersey action. Defendants argue, however, that this Court should reject Judge Bassler's holding because a recent letter from PennMont's counsel demonstrates that exhaustion would be futile. This Court finds that the issues presented are identical to those of the New Jersey action. Moreover, the Court finds Judge Bassler's reasoning in his March 28, 2002 opinion to be persuasive. Accordingly, as discussed below, Plaintiffs' Motion is granted.

II. LEGAL STANDARD

Plaintiffs seek dismissal of Defendants' counterclaims on several grounds, including: (1) SCM, as an employer, lacks standing to bring these counterclaims under ERISA; (2) any Defendants with standing to bring these claims failed to exhaust their remedies under the plan, as required by ERISA; and (3) because ERISA totally preempts all of Defendants' claims, they must exhaust their plan

remedies as to each claim. Plaintiffs bring this Motion under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Because of the fundamental differences between a 12(b)(1) review and a 12(b)(6) review,[1] it is important to clarify exactly which analysis is being undertaken. Anjelino v. New York Times Co., 200 F.3d 73, 87-88 (3d Cir. 2000).

A. Failure to Exhaust Plan Remedies

In most circumstances, motions for dismissal based on a failure to exhaust or a timeliness defense are reviewed under Rule 12(b)(6), rather than 12(b)(1), because the exhaustion requirement normally does not implicate a court's jurisdiction. Anjelino, 200 F.3d at 87-88; see also D'Amico v. CBS Corp., 297 F.3d 287, 290 (3d Cir. 2002) (affirming district court grant of summary judgment for failure to exhaust under converted 12(b)(6) motion rather than 12(b)(1)). But see W.B. v. Matula, 67 F.3d 484, 493 (finding motion to dismiss IDEA claims "jurisdictional in nature"). In Anjelino, the Third Circuit held that a motion to dismiss for failure to exhaust Title VII administrative claims must be examined under 12(b)(6). The court stated that exhaustion requirements exist to provide courts with agency expertise and factual development and, as such, do not affect a district court's subject

[1] In Anjelino, the Third Circuit described the differences between the two analyses as "under Rule 12(b)(1), [the] existence of disputed material facts will not preclude the court from evaluating the merits of a jurisdictional claim, [while] . . . under Rule 12(b)(6), . . . the court is required to accept as true all the allegations of the complaint and inferences arising from them . . . ." 200 F.3d at 87 (citations omitted).

matter jurisdiction. Id. In contrast, the Matula court determined that exhaustion is jurisdictional in the IDEA context. 67 F.3d at 493. This decision, however, was based largely on the certain unique features of the IDEA which are not present in this case. Finally, in D'Amico, which was an ERISA case, the Third Circuit affirmed a district court's decision to treat a motion to dismiss for failure to exhaust as a 12(b)(6) motion, despite the fact that it was plead under 12(b)(1). Accordingly, this Court will undertake a 12(b)(6) review of this portion of Plaintiffs' motion and accept Defendants' allegations in this area as true.

When considering a motion to dismiss a complaint for failure to state a claim under Rule 12(b)(6), the Court must accept as true all facts alleged by the non-moving party and any reasonable inferences that can be drawn therefrom. Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)); see also H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989). The court is not required to credit a party's "bald assertions" or "legal conclusions" when deciding a motion to dismiss. See Id. The Federal Rules merely require "a short and plain statement of the claim showing that the pleader is entitled to relief," enough to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Fed. R. Civ. P. 8(a)(2) (West 2001).

B. Standing

Motions to dismiss for lack of standing are reviewed under Rule 12(b)(1). Maio v. Aetna, 221 F.3d 472, 482 & n. 7 (3d Cir. 2000). Federal Rule of Civil Procedure 12(b)(1) provides that a court may dismiss a complaint for "lack of jurisdiction over the subject matter." Rule 12(b)(1) motions may attack subject matter jurisdiction on one of two grounds, either facial or factual. Gould Elec., Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000) (citing Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)). In a facial challenge, a court may only consider, in the light most favorable to the non-moving party, the allegations of the complaint and the documents referenced therein. Id. at 176. In contrast, when considering a factual challenge, a court must evaluate the jurisdictional merits for itself and need not attach any presumption of truthfulness to the non-moving party's allegations. Carpet Group Int'l v. Oriental Rug Importers Assoc., 227 F.3d 62, 69 (3d Cir. 2000) (citing Mortenson, 549 F.2d at 884). Moreover, a court reviewing a factual attack may consider evidence outside the pleadings. Id. The burden of establishing subject matter jurisdiction lies with the non-moving party. Id.

In this case, Plaintiffs attack jurisdiction on factual grounds. In their motion, Plaintiffs argue that SCM is properly classified as an employer, not a fiduciary, under ERISA. As employers lack standing under ERISA, Plaintiffs argue that SCM has

no standing to raise these claims on behalf of its employees. Because Plaintiffs are attacking the factual basis of jurisdiction, this Court must determine for itself whether jurisdiction lies and, for purposes of this part of the review, need not confine itself to the pleadings.

III. DISCUSSION

Initially, the Court notes that ERISA completely preempts all common law tort or contract claims related to an employee benefit plan. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 62-63, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987). In their counterclaims, Defendants are seeking relief from Plaintiffs' alleged violation of an ERISA-regulated plan. Accordingly, Defendants' claims must meet ERISA's unique statutory requirements, including the standing requirement found at 29 U.S.C. § 1132(a) and the exhaustion requirement imposed in this Circuit. Otherwise, Defendants' counterclaims must be dismissed in their entirety.

A. Standing

Only certain categories of claimants are empowered to bring a civil enforcement action under ERISA. 29 U.S.C. § 1132(a). Specifically, only participants, beneficiaries, fiduciaries, or the Secretary of Labor may sue to enforce plan terms. Id.; Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 21, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983). In their motion to dismiss,

Plaintiffs argue that some of the Defendants lack standing under ERISA to assert their counterclaims.

1. SCM

Plaintiffs argue that SCM, acting as an employer on behalf of its employees, lacks standing to bring an enforcement claim under ERISA because it is not a participant, beneficiary, or fiduciary under the Act. Initially, this Court finds that SCM cannot be considered a "participant" under ERISA, because the statute specifically limits this status to "any employee or former employee . . . or any member or former member of any employee organization, who is . . . eligible [for benefits] . . . from an employee benefit plan." 29 U.S.C. § 1002(7). Moreover, SCM cannot be considered a "beneficiary" for ERISA purposes, because that category is limited to persons designated by a participant to receive the participant's benefits under an employee benefit plan. 29 U.S.C. § 1002(8).

In certain limited situations, an employer can be considered a "fiduciary" within the meaning of the Act. U.S. Steel Corp. v. Pa. Human Relations Comm., 669 F.2d 124, 126-28 (3d Cir. 1982). SCM does not argue, however, that it is a fiduciary under the Act. Instead, SCM points to Bollman Hat Co. v. Root, 112 F.3d 113 (3d Cir. 1997), for the proposition that plan sponsors have standing to bring ERISA enforcement actions under federal common law. Defendants, however, read Bollman too broadly because nothing in

that case provides standing for SCM to bring these claims on behalf of its employees.

In Bollman, the Third Circuit held that federal common law supports jurisdiction in cases where "the issue presented was one 'of central concern' to ERISA[,]" even if a party does not have standing under the Act itself. 112 F.3d at 115 (quoting Airco Indus. Gases, Inc. v. Teamsters Health and Welfare Pension Fund of Phila. and Vicinity, 850 F.2d 1028, 1033 (3d Cir. 1988)). The Bollman court cited examples of issues of central concern to ERISA, including whether courts should use unjust enrichment principles to fill in gaps left by ERISA. Id. at 115-16 (citing Provident Life & Accident Ins. Co. v. Waller, 906 F.2d 985, 991 (4th Cir. 1990)). Defendants assert that the central issue presented in this case is "protect[ing] the rights of the employees and . . . enforc[ing] fiduciary standards." Defs.' Mem. at 5-6. In his opinion, Judge Bassler found that this was not an issue of central concern to ERISA. This Court agrees. Defendants are essentially seeking to enforce their rights under the plan. Moreover, unlike Bollman, the plan at issue here contains language specifically addressing Defendants' claims. Accordingly, SCM has not shown that it can assert standing under the federal common law principles described in Bollman. As a result, all claims asserted by SCM must be dismissed for lack of standing.

2. Michael Zimmerman, Dorothy Zimmerman, Kelvin Burseth, Donna Arvelo, Gerrard Raffa, and Riguad Destinobles

In their counterclaim, Defendants assert that each of the above-named counterclaimants were employees of SCM and, as such, were participants in the VEBA plan. Def.'s Counterclaim at 17. In their filings, Plaintiffs do not seem to contest the claim that each of these individuals are or were participants under the VEBA plan. As noted above, an individual is considered a "participant" for ERISA purposes if they are employees or former employees who are eligible for benefits under a qualified employee benefits plan. 29 U.S.C. § 1002(7). Accordingly, each of the above-named counterclaimants has standing, as participants within the meaning of ERISA, to assert their respective counterclaims.

3. Craig Waitt

Plaintiffs argue that Craig Waitt lacks standing to bring this enforcement claim because he does not allege that he is a beneficiary under the plan. Pls.' Mem. at 17. In their counterclaim, however, Defendants state that Waitt was a "beneficiary under the VEBA plan." Defs.' Counterclaim at 20. Accordingly, this Court finds that Waitt has standing, as beneficiary under his wife's plan, to pursue his ERISA claim for her life benefits.

B. Exhaustion of Plan Remedies

In the Third Circuit, except in certain limited circumstances, a party bringing an enforcement claim under ERISA must exhaust the

remedies available under the plan. Weldon v. Kraft, 896 F.2d 793, 800 (3d Cir. 1990) (citing Wolf v. Nat'l Shopmen Pension Fund, 728 F.2d 182, 186-87 (3d Cir. 1984)). The exhaustion requirement serves several purposes, including: (1) reducing the number of frivolous ERISA suits; (2) promoting non-adversarial resolutions to ERISA disputes; (3) minimizing costs; and (4) preventing premature judicial intervention. Harrow v. Prudential Ins. Co. of Am., 279 F.3d 244, 249 (3d Cir. 2002).

In their response to Plaintiffs' motion, Defendants do not dispute that the exhaustion requirement is applicable to their claims. Defs.' Mem. at 6. Instead, Defendants rely on two exceptions to the exhaustion requirement recognized in this Circuit – the futility exception and the exception for claims asserting a breach of fiduciary duty. As discussed below, this Court finds these exceptions inapplicable to the Defendants' counterclaims.

1. Futility

First, the exhaustion requirement is waived in situations where resort to the plan remedies would be futile. Harrow, 279 F.3d at 249 (citing Berger v. Edgewater Steel Co., 911 F.2d 911, 916 (3d Cir. 1990)). A party claiming futility must make a "clear and positive showing" that further attempts to seek redress under the plan would be futile. Id. (citing Brown v. Cont'l Baking Co., 891 F. Supp. 238, 241 (E.D. Pa. 1995)). In evaluating a futility argument, a court must weigh several factors, including whether:

(1) plaintiff acted diligently in pursuing administrative relief; (2) plaintiff acted reasonably in seeking immediate judicial review; (3) a fixed policy denying benefits existed; (4) the insurance company failed to comply with its own internal procedures; and (5) the plan administrator asserts that further administrative actions are futile. Id. (citing Berger, 911 F.2d at 916-17). All factors need not weigh equally. Id.

Applying the factors to this case, it is clear that Defendants have not established the futility of the plan remedies available to them. In support of their futility argument, Defendants rely heavily on the third Harrow prong, claiming that a letter they received from Plaintiffs shows that a fixed policy exists, denying them the benefits they are seeking.

Defendants point to a May 17, 2002 letter sent by Jeanne Bonney, counsel for PennMont. Defs.' Mem. at 6 & Ex. E. In this letter, Ms. Bonney states that "no person is entitled to a benefit if their employer's right to participate in the VEBA plan has been terminated[,]" as SCM's has. Id. In this same letter, however, Ms. Bonney also states that, once the alleged participant or beneficiary or their lawyer files a claim, then PennMont "can proceed in determining the validity of [the] claim." Id. Accordingly, this letter is not enough to establish a clear and positive showing of futility. As a result, the exhaustion requirement cannot be waived under the futility exception.

2. Breach of Fiduciary Duty

Second, an exception exists where a party asserts a breach of fiduciary duty claim against a plan administrator under § 404 of ERISA. Harrow, 279 F.3d at 253 (citing Zipf v. Am. Tel. & Tel. Co., 799 F.2d 889, 892-93 (3d Cir. 1986)). The breach of fiduciary duty claim must be independent of any claim for benefits. Id. (citing Smith v. Sydnor, 184 F.3d 356, 363 (4th Cir. 1999)). If not, claimants could avoid the exhaustion requirement by artfully pleading benefits claims as breach of fiduciary duty claims. Id. (citing Drinkwater v. Metro. Life Ins. Co., 846 F.2d 821, 826 (1st Cir. 1988)).

In Harrow, the plaintiffs alleged that the defendants' failure to provide coverage for the prescription drug Viagra was a breach of fiduciary duty. 279 F.3d at 246. The Third Circuit found that the claim was premised on the administrator's failure to provide a benefit under the plan, rather than on any breach of the administrator's fiduciary duty. Id. at 254-55. In refusing to invoke the fiduciary breach exception to the exhaustion requirement, the court noted that many benefits claims will also implicate ERISA's statutory requirements, but that such a "'prospect does not give a claimant a license to attach a 'statutory violation' sticker to his or her claim . . . .'" Id. at 255 (quoting Diaz v. United Agric. Employee Welfare Ben. Plan & Trust, 50 F.3d 1478, 1484 (9th 1995)). Similarly, in this case,

Defendants' counterclaims are based on the fiduciary's duties under the plan, rather than on a claim that fiduciary duties were violated in administering the plan.

In their counterclaims, Defendants assert that Plaintiffs breached their fiduciary duties by: (1) refusing to return to SCM's employees their share of plan assets; (2) imposing unwarranted conditions on the discharge of their fiduciary obligations; and (3) threatening to misapply employees' assets to defend this litigation. Defs.' Counterclaim at 18-19. This Court finds that these alleged fiduciary duty claims are, in truth, artfully pleaded benefit claims. Defendants are seeking the return of money paid into the plan based on the theory that Plaintiffs have violated plan terms. Moreover, Defendants' charge that Plaintiffs have placed "unwarranted conditions on the discharge of their fiduciary duties" appears to refer to Plaintiffs' demand that Defendants sign release forms before receiving the funds they are seeking. As Plaintiffs properly point out, § 10.11 of the Plan requires such a release by the Trustee or Plan Administrator "in its sole and absolute discretion." Pls.' Mem. at 23. Finally, this Court finds no support for Defendants' assertion that Plaintiff threatened to use plan funds to defend this litigation. Accordingly, this Court finds the exception for breach of fiduciary duty claims is not applicable to Defendants' counterclaims.

In sum, Defendants do not dispute that the exhaustion requirement applies to their claims. Moreover, this Court finds that neither the futility exception nor the exception for breach of fiduciary duty claims is applicable in this case. Accordingly, Defendants must exhaust their remedies under the plan before bringing their ERISA claims.

IV. CONCLUSION

Defendants' counterclaims must be dismissed because (1) Defendant SCM lacks standing to bring its counterclaims; and (2) all other Defendants failed to exhaust their remedies under the plan. Accordingly, Defendants' Counterclaims are dismissed without prejudice, so that Defendants may pursue these claims once they have exhausted their remedies under the plan.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REGIONAL EMPLOYERS' ASSURANCE LEAGUES VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION TRUST, et al.	:	CIVIL ACTION
v.	:	
SIDNEY CHARLES MARKETS, INC., et al.	:	NO. 01-4693

O R D E R

AND NOW, this 29th day of January, 2003, upon consideration of Defendants Sidney Charles Markets, Inc., et al.'s Petition for Admission Pro Hac Vice of Joel N. Kreizman, Esq., (Docket No. 19) and Plaintiffs Regional Employers' Assurance Leagues Voluntary Employees' Beneficiary Association Trust, et al.'s Motion to Dismiss Defendants' Counterclaims (Docket No. 13), IT IS HEREBY ORDERED that:

(1) Defendants' Motion for Admission Pro Hac Vice of Joel N. Kreizman (Docket No. 19) is **GRANTED**[2];

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[2] The power to grant a pro hac vice motion is within the discretion of the Court. See, e.g., Montgomery County v. Microvote Corp., No. 97-6331, 2000 WL 289560, at *1 (E.D. Pa. March 16, 2000). Local Rule 83.5.2 governs the consideration of an application for admission pro hac vice. Local Rule 83.5.2(a) provides, inter alia, that "any attorney who is not a member of the bar of this Court shall, in each proceeding in which that attorney desires to appear, have as associate counsel of record a member of the bar of this Court upon whom all pleadings, motions, notices, and other papers can be served . . . ." Moreover, the motion for pro hac vice admission must be made by a member of the bar of the Eastern District on behalf of the out-of-district attorney. See, e.g., Microvote, 2000 WL 289560 at *1; Zurich Ins. Co. v. United Capitol Ins. Co., No. 96-7075, 1997 U.S. Dist. LEXIS 947 (E.D. Pa. Jan. 8, 1997).

In this motion, Mr. Joshua B. Ladov, a member of the bar of the Eastern District, moves for admission of Mr. Kreizman. Additionally, Mr. Ladov has agreed to serve as Mr. Kreizman's associate for filing purposes. Accordingly, Plaintiffs' Motion is granted.

(2) Plaintiffs' Motion to Dismiss Defendants' Counterclaims (Docket No. 13) is **GRANTED**; and

(3) Defendants' Counterclaims are **DISMISSED without prejudice**.

BY THE COURT:

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HERBERT J. HUTTON, J.